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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIDAMERICAN ENERGY COMPANY
AND THE CITY OF LE MARS, IOWA

Defendants.

Civil Action No. C07-4045

Judge _____

CONSENT DECREE

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**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

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MIDAMERICAN ENERGY COMPANY AND THE CITY OF LE MARS, IOWA

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Civil Action No.

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CONSENT DECREE

Whereas, the United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Le Mars Coal Gas Superfund Site in the City of Le Mars, Plymouth County, Iowa (“the Site”).

Whereas, the United States (consistent with Sections 106, 107 and 122 of CERCLA) seeks in its complaint (and the herein proposed settlement) inter alia: (1) reimbursement of costs incurred by the United States (including EPA, ATSDR, and the Department of Justice) for response actions at the Le Mars Coal Gas Superfund Site in Le Mars, Plymouth County, Iowa, together with accrued interest; and (2) performance of certain response work at the Site by the City of Le Mars (under an Administrative Order) consistent with the National Contingency Plan,

40 C.F.R. Part 300 (as amended) ("NCP").

Whereas, the defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the United States arising out of the transactions or occurrences alleged in the complaint.

Whereas, the Le Mars Coal Gas Superfund Site (the Site) encompasses approximately 1.6 acres and is located at 331 First Street, NE, Le Mars, Plymouth County, Iowa, and depicted generally on the maps attached as Appendix A. The Site is triangular in shape and bordered on the northwest, the hypotenuse of the right triangle, by railroad tracks of the Union Pacific and Canadian National Railroads and on the east by 4th Avenue NE, and on the south by 1st Street NE.

Whereas, the Site was operated previously as a manufactured gas plant (MGP) which produced coal gas. The Le Mars Gas Light Company constructed and operated the manufactured gas plant (a/k/a a coal gasification plant) from 1884 until roughly the end of the century. The initial plant included, among other things, a production building with a retort room, coal room, lime and meter room, and purifying room; a gas holder; a tar well; and an office building. The Le Mars Gas Light Company dissolved in 1904.

Whereas, the Le Mars Gas Company acquired the plant in 1898. The Le Mars Gas Company owned and operated the Site property and the MGP from approximately 1898 to 1942. During the course of its ownership and operation, the Le Mars Gas Company expanded the plant operations, including the addition of plant facilities (including oil tanks and a 100,000 cubic foot gas holder) and the eventual conversion of the plant operations from coal gas to carbureted water (oil and water) gas.

Whereas, in 1942, Iowa Public Service Company (IPSC) became the owner and operator of the Site when it purchased property that included the Site property, the plant and its structures,

and the existing utility operations, including the gas distribution system. Following SEC approval, IPSC acquired the Site, the plant property and the utility operations of Le Mars Gas Company. In 1942, the Le Mars Gas Company transferred, assigned, and set over to IPSC and its successors and assigns its rights and duties (for a period of 25 years) under Ordinance 236, including, but not limited to the right to establish, maintain and operate a gas works plant and a distribution system within the City of Le Mars.¹ The Le Mars Gas Company then dissolved in 1942.

Whereas, IPSC modified the Site property and structures, including portions of the MGP, during the time IPSC owned and operated the Site. Among other things, IPSC modified existing buildings, removed certain fixtures from the gas plant, constructed a building, and dismantled existing portions of the manufactured gas plant, including the plant building and gas holders. Among other things, IPSC arranged by contract in March 1953 to demolish the MGP building and certain structures and fixtures ("the old gas plant") and to build a 150' by 72' building in its place.

Whereas, IPSC owned and operated the Site from approximately 1942 to August 1953. Following certain plant demolition and building construction activities, IPSC sold most of the Site property to C.W. Miller in August 1953, except the trade fixtures in the old gas plant and a portion of the property described in the final deed, a 20' by 72' building located on the premises. IPSC leased back the portion of the Site it had sold for a period of twenty years and continued in possession and operation at the Site until at least 1967. In or around 1962, certain construction activities occurred, including the following: a perennial ditch traversing the Site that flows to

¹ In 1963, those rights and duties granted to IPSC, its successors and assigns, were renewed for another 25 years by Ordinance 411.

Willow Creek and the Floyd River was completely covered and a concrete culvert was constructed at the Site.

Whereas, in September 1967, C.W. Miller sold the property that he owned, subject to the twenty-year lease with IPSC, to the City of Le Mars, reserving the same portion that had not been conveyed to C.W. Miller by IPSC – the portion of the property described in the deed, a 20' by 72' building located on the premises.

Whereas, the City of Le Mars is the current owner of that portion of the Site property conveyed by Miller and uses it for operations of the City's Street Department. The Le Mars Street Department uses the property for office, maintenance, and storage facilities. The Site now includes an office and maintenance shop building, two storage buildings, a shed, a gravel (formerly paved) parking lot, a gas pump, and an above ground waste oil tank. The Site at times included a tar well and a number of underground storage tanks, some associated with the manufactured gas plant and others installed in the mid-1980s by the City. Prior to EPA removal activities, the Site included a tar well and at least three tanks installed by the City, including a 2000 gallon underground diesel tank, a 12,000 gallon underground gasoline tank, and a 500 gallon underground waste oil tank.

Whereas, all surface water flows into a perennial drainage ditch, which is about ten (10) feet deep. The perennial drainage ditch (previously cutting across the surface of the Site and traversing the Site, but now covered with a concrete drainage culvert) extends south underneath the manufactured gas plant Site and empties into an open drainage ditch. The drainage ditch flows below the railroad tracks on the northern Site boundary. Surface water from the Site also drains into this ditch. The drainage ditch flows into Willow Creek, which empties into the Floyd River, a tributary to the Missouri River.

Whereas, land use adjacent and surrounding the Site includes mixed residential and commercial properties.

Whereas, the City of Le Mars uses six municipal wells (well numbers 4, 6, 7, 8, 9, and 10) [with depths greater than 300 feet below ground surface]. Private residential wells are also in use within the city limits of Le Mars. The nearest municipal wells, well numbers 4 and 8 (which are operational and not currently used for drinking water purposes), are located approximately 2,000 feet downgradient of the Site. Six private residential wells are located within one mile of the Site.

Whereas, in or around 1985, the City of Le Mars installed underground storage tanks (USTs) for gasoline and/or diesel oil. During the installation, the City noted and observed contamination at the Site. Thirteen foot deep monitoring wells were installed adjacent to the tanks subsequent to the installation of the USTs. The Iowa Department of Natural Resources was informed of contamination and releases in 1990.

Whereas, in 1990, the City of Le Mars collected subsurface samples from a soil boring near the USTs at the Site. The analytical results associated with the samples were indicative of a UST leak because they documented the presence of total organic hydrocarbons (TOHs) in concentrations as high as 2,300 ug/g. The results exceeded Iowa Department of Natural Resources (IDNR) guidelines of 100 ug/g.

Whereas, IDNR requested pressure tests of the USTs to detect potential releases of hazardous substances and/or gasoline or diesel fuel. The City of Le Mars performed the required tests in December 1990. EPA requested but did not receive the results of the tests. The City maintains that the pressure tests may not have revealed that the USTs were leaking. Other evidence indicates releases of petroleum near the USTs.

Whereas, during the installation of additional monitoring wells at the Site in 1995, the State detected a strong cresol odor in the soils. Sampling revealed the presence of carcinogenic and non-carcinogenic polynuclear aromatic hydrocarbons ("PAHs") and total petroleum hydrocarbons (TPH) (as gasoline and fuel oil). The State subsequently referred the Site to EPA.

Whereas, releases and threatened releases of hazardous substances have occurred and are occurring at the Site. Those hazardous substances include coal tar wastes composed of polynuclear aromatic hydrocarbons (PAHs) such as benzo(a)pyrene, naphthalene, anthracene, acenaphthahlene, and phenanthrene; phenolic compounds including phenol and methylphenols; light aromatic compounds such as benzene, toluene and xylenes; various organic compounds such as dibenzofuran; inorganics including cyanide, arsenic, chromium, lead, copper, zinc, iron; sulfides; ammonia; and nitrates.

Whereas, EPA has conducted response actions at the Site pursuant to CERCLA Section 104, 42 U.S.C. § 9604, to evaluate and address the releases and threatened releases of hazardous substances at the Site.

Whereas, in 1995, EPA conducted a Preliminary Assessment at the Site, confirming releases and threatened releases of hazardous substances in the soils and groundwater, including PAHs and TPHs.

Whereas, in 1997, EPA conducted a Site Investigation at the Site. The Site Investigation confirmed releases and threatened releases of hazardous substances at the Site from soils and groundwater, including volatile and semi-volatile organic compounds (VOCs and SVOCs), carcinogenic and non-carcinogenic PAHs, metals, and cyanide. Sampling results documented contamination of the groundwater, surface and subsurface soil, and sediment. Sampling results confirmed releases and threatened releases and elevated levels of hazardous substances at the

Site, including (1) carcinogenic PAHs such as benzo(a)anthracene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, chrysene, dibenzo(a,h) anthracene, indeno(1,2,3-cd), and other toxic and probable carcinogenic PAHs such as phenanthrene and pyrene (which EPA has not yet definitively classified because the data reviewed contained no human data and inadequate animal bioassays that are decades old); (2) VOCs such as benzene, toluene, ethyl benzene, acetone, carbon disulfide, methyl ethyl ketone, styrene, and xylene; (3) SVOCs such as naphthalene, 2-methylnaphthalene, phenol, 2-methylphenol (o-cresol); 4 methylphenol (p-cresol); carbozole; and dibenzofuran; (4) metals and inorganics such as manganese, copper, cadmium, arsenic, lead, and cyanide.

Whereas, in 2000, EPA conducted an Expanded Site Investigation at the Site, which included installation of 12 groundwater monitoring wells, sampling soil, sediment, and surface water, and further evaluation of the threat to human health and the environment. Sampling confirmed releases and threatened releases of hazardous substances (including VOCs, SVOCs, PAHs, and metals) at and from the Site. Samples from the monitoring wells indicated that VOCs, including benzene and toluene, PAHs and cyanide have migrated off-site in the shallow aquifer. Sediment samples taken from the drainage ditch indicated elevated PAH levels, including benzo(a)pyrene. Elevated PAH levels, including naphthalene, benzo(a)anthracene, benzo(a)pyrene, and indeno(1,2,3-cd)pyrene; VOC levels, including benzene, toluene, ethyl benzene, and xylene; and cyanide levels were detected in surface and subsurface soils on-site as well as at an adjacent residence. Highly contaminated soil samples were collected from locations where former manufactured gas plant structures, including the gasometer, gas holders and tar well, were located.

Whereas, in 2003, EPA completed an Engineering Evaluation/Cost Analysis (EE/CA) to

identify and evaluate proposed removal action alternatives to address the contamination at the Site, including the benzene and total B(a)P equivalents-contaminated soil and groundwater and other hazardous substances at the Site.

Whereas, on September 26, 2003, EPA approved and issued an Action Memorandum authorizing a non-time critical removal action at the Site, pursuant to CERCLA Section 104, 42 U.S.C. § 9604, and NCP Section 300.415, 40 C.F.R. § 300.415. On April 24, 2004, EPA commenced the removal action to addresses releases and threatened releases of hazardous substances at the Site, including benzene, toluene, ethylbenzene, xylenes (BTEX) and polycyclic aeromatic hydrocarbons (PAHs). The removal action includes, but is not limited to, excavation down to the water table of approximately 14 feet of contaminated soil, thermal treatment or disposal of waste materials in a RCRA Subtitle D Landfill, backfill of excavated areas, and removal of certain structures, including Gas Holders A and B, the tar well, the 12,000-gallon UST, two 6,000-gallon oil tanks, and one 2,000-gallon UST. On May 12, 2004, EPA approved and issued an Action Memorandum Amendment, enabling all contaminated soil to be sent to an offsite thermal treatment facility. EPA will monitor and evaluate the removal action (including the actions of the City under the Order) to ensure the effectiveness and integrity of those response actions, and to determine whether the response actions are sufficiently protective of human health and the environment. EPA has not determined the extent of additional response actions that may be undertaken at the Site.

Whereas, PAHs are hazardous substances and comprise a class of compounds that include naphthalene, benzo(a)anthracene, benzo(a)pyrene, and indeno(1,2,3-cd)pyrene, among others. PAHs may be toxic to humans and animals via oral, dermal, or respiratory routes of exposure. As environmental pollutants, PAHs are slightly to moderately soluble in water and are soluble in

other organic compounds such as benzene. Some PAHs are animal carcinogens. Some PAHs are probable human carcinogens.

Whereas, benzene, toluene, ethyl benzene, and xylene (BTEX), which are light aromatic hydrocarbons detected at the Site, are hazardous substances. Benzene is a human carcinogen. These compounds may be toxic to humans and animals via oral, respiratory, or dermal routes of exposure. They are slightly soluble in water and volatile in the environment.

Whereas, VOCs are hazardous substances. Chlorinated VOCs are widely used as solvents and evaporate easily. These compounds may be toxic to humans and animals via oral, dermal, or respiratory routes of exposure. Some chlorinated VOCs are animal carcinogens. Some chlorinated VOCs are probable human carcinogens.

Whereas, EPA has determined that the releases and threatened releases of hazardous substances and conditions at the Site present an imminent and substantial endangerment to public health or welfare and the environment.

Whereas, during the United States' negotiations with settling Defendants, EPA issued an Administrative Order on Consent ("Order" or "AOC"), pursuant to CERCLA Sections 104, 106(a), and 122, 42 U.S.C. §§ 9604, 9606(a), and 9622 (and consistent with delegations of authority to the Administrator of EPA by Executive Order No 12580, January 23, 1987, 52 Fed. Reg. 2923, and further delegations to EPA Regional Administrators by EPA delegation No 14-14-C, and delegations by the Regional Administrator for EPA Region 7 to the Director of the Superfund Division, EPA Region 7 by EPA Delegation No. R7-14-14-C). The Order, entered into voluntarily by the City of Le Mars, provides for the City's performance of certain response actions (consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP")) in coordination with EPA's Non-Time-Critical Removal Action at the Site.

Whereas, EPA has notified the State of Iowa of this action, including negotiations with the PRPs and the Administrative Order on Consent, pursuant to Section 106 and 121 of CERCLA, 42 U.S.C. §§ 9606 and 9621, and 40 CFR 300.520(a) and 300.525(e). EPA notified the State of Iowa (IDNR) on June 23, 2004, concerning negotiations with the potentially responsible parties and the AOC; EPA again notified the State of the proposed action and Consent Decree negotiations on September 27, 2006.

Whereas, EPA notified the potential federal natural resource trustees for the Site, U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration, on September 27, 2006, and November 15, 2006, respectively, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree, in accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. §9622(j)(1).

Whereas, the United States and Settling Defendants agree and the Court by entering and approving this Consent Decree finds that this Settlement Agreement has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, consistent with CERCLA, and in the public interest.

NOW, THEREFORE, without the admission of liability or any adjudication on any issue of fact or law, and upon the consent and agreement of the parties to this Settlement Agreement by their attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendants and their heirs, successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

III. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "City of Le Mars" or the "City" shall mean the City of Le Mars, Iowa, all departments, divisions, and offices.
- c. "Consent Decree" shall mean this Consent Decree and all appendices to it. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "Effective Date" shall mean the effective date of this Consent Decree as provided in Paragraph 49 of this Decree

g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

h. "Future Response Costs" or "future costs" shall mean the following:

(1) all costs, including but not limited to direct and indirect costs, that EPA or DOJ has incurred or incurs and pays at or in connection with the Site between the date identified in the definition of Past Response Costs and the date of Certification of Completion under Paragraph 26. Such costs shall include, but not be limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree and the Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections V (Work), XII and XIII (ACCESS TO PROPERTY AND INSTITUTIONAL CONTROLS; ACCESS TO INFORMATION) (including, but not limited to, attorney's fees and any monies paid to secure access and/or to secure institutional controls, including the amount of just compensation), and Paragraph 26 of Section IX (EPA's Certification), and any work takeover costs under the Order, unless such takeover is due to noncompliance by the City

with the Decree or Order. Such costs shall also include, with respect to MidAmerican only, the costs incurred by EPA to perform work, required to be performed by the City under the Order, in the event of EPA work takeover due to the City's noncompliance with the Order or Decree.

(2) Future Response Costs shall also include all Interim Response Costs and all Interest on response costs, including Past Response Costs, that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from January 27, 2005, to the date of entry of this Consent Decree.

i. "Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

j. Unless otherwise required by federal law (e.g., 28 U.S. § 1961, Interest on judgments), "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

k. "Interim Response Costs" shall mean all response costs, including direct and indirect response costs, (a) incurred and paid by the United States in connection with the Site between January 27, 2005, and the Effective Date, and (b) incurred prior to the Effective Date, but paid after that date.

l. "MidAmerican Energy Company" or "MidAmerican" shall mean MidAmerican Energy Company a corporation organized and existing under the laws of the State of Iowa, its officers, directors, shareholders, employees, successors, and assigns. MidAmerican is a

corporate successor to the Iowa Public Service Company. MidAmerican is also the corporate successor to, among others, Sioux City Gas and Electric Company, Midwest Power Systems Inc, and Midwest Resources Inc., and Midwest Energy Company.

m. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

n. "Order," "Administrative Order on Consent," "Administrative Order," "Order on Consent," or "AOC" shall mean the February 4, 2005, Administrative Order on Consent issued by EPA to the City of Le Mars and all appendices attached thereto.

o. "Owner Settling Defendant" shall mean any Settling Defendant who owns or controls the Site property or any portion thereof, including the City of Le Mars.

p. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

q. "Parties" shall mean the United States and Settling Defendants (MidAmerican Energy Company and the City of Le Mars).

r. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that the United States, including, EPA, ATSDR, and DOJ, has paid or incurred at or in connection with the Site through January 27, 2005, plus accrued Interest on all such costs through such date.

s. "Plaintiff" shall mean the United States.

t. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

u. "Removal Action" shall mean all the response actions taken by EPA pursuant

to the September 26, 2003, Action Memorandum as amended in May 2004, including oversight of the City's Work under the Order and this Decree and related post removal site control.

v. "Response Costs" shall mean Past Response Costs, Interim Response Costs, and Future Response Costs.

w. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

x. "Settling Defendants" shall mean MidAmerican Energy Company and the City of Le Mars.

y. "Site" shall mean the Le Mars Coal Gas Superfund Site, encompassing approximately 1.6 acres, located at 331 First Street, NE, in the City of Le Mars, Plymouth County, Iowa, depicted generally on the maps attached as Appendix A, and generally designated by the property description set forth in the above "Whereas" clause. The Site incorporates part of the property described in the Deed dated January 23, 1942, filed and recorded in the local land records for Plymouth County on January 28, 1942 (Town Lot Deed Record, No. 41, Plymouth County a/k/a LeMars Gas Company to Iowa Public Service Company Deed #941), and includes land underlying and property described in Book 11, page 372 of the land records -- a 72' by 22' building situated on Outlot Five that IPSC purchased in July 1951. The Site includes the property described in the following instruments and subject to a lease agreement with IPSC (1) deed dated August 6, 1953, filed and recorded in Plymouth County land records on August 23, 1953 (a/k/a Iowa Public Service Company to Christ W. Miller Deed); and (2) a September 14, 1967, real estate contract between Christ W. Miller and the City of Le Mars.

z. "State" shall mean the State of Iowa.

aa. "Statement of Work" or "SOW" as referenced in the Consent Decree shall

mean the statement of work for implementation of the "Work" and response activities by the City of Le Mars required by EPA's February 4, 2004, Administrative Order on Consent set forth in Appendix B of this Consent Decree, including those set forth in appendix C to the Order, and any modifications made thereto in accordance with the Order and/or this Decree.

bb. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

cc. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under IOWA Administrative Code 567, Chapters 100 to 219.

dd. "Work" shall include all response activities referenced, described, requested, required under, and/or set forth in this Consent Decree (including the attached Order) that the City of Le Mars is required to perform under the Administrative Order on Consent and this Consent Decree, except those activities required by Section XIV (RETENTION OF RECORDS) of the Decree and Section XI (RECORD RETENTION) of the Order.

IV. GENERAL PROVISIONS

4. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to reimburse and recover response costs incurred and to be incurred by the United States for response actions to protect public health or welfare or the environment at the Site; to acknowledge certain response actions the City has voluntarily performed and will perform pursuant to an Administrative Order on Consent issued by EPA on February 4, 2005; and to resolve the claims of the United States against the Settling Defendants and any potential claims

of Settling Defendants which could have been asserted against the United States with regard to this Site as provided in this Consent Decree.

5. Commitments by Settling Defendants.

a. The City of Le Mars shall perform certain Work in accordance with this Consent Decree and the Administrative Order on Consent, including the SOW, any work plans and other plans, standards, specifications, and schedules set forth therein or developed by the City and approved by EPA pursuant to this Consent Decree or the Order. The City shall also reimburse the United States for Response Costs as provided in this Consent Decree.

b. MidAmerican Energy Company shall reimburse the United States for certain Response Costs as set forth herein and comply with the terms of this Consent Decree.

6. Compliance With Applicable Law. Consistent with Paragraph 83 of the AOC, all activities undertaken by the City pursuant to the Order on Consent shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. All on-site actions pursuant to the Order shall to the extent practicable, as determined by EPA considering exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal or state environmental or facility siting laws. The activities conducted pursuant to the Order, if approved by EPA, shall be considered to be consistent with the NCP.

7. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-Site requires a federal or state permit or approval, the City shall submit timely and complete

applications and take all other actions necessary to obtain all such permits or approvals. *See* Order at ¶83.

b. This Consent Decree and the Order are not and shall not be construed to be a permit issued pursuant to any federal or state statute or regulation. This Consent Decree shall not be construed to relieve the City of any obligations to comply with the terms and requirements of the Order.

8. Notice to Successors-in-Title.

a. With respect to any property or portion of property owned or controlled by any Settling Defendant that is located within the Site or any part of the Site, within thirty (30) days after the entry of this Consent Decree, the Owner Settling Defendant(s) shall submit to EPA for review and approval a notice to be filed with the Recorder's Office or Registry of Deeds or other appropriate land records office of Plymouth County, State of Iowa, which shall provide notice to all successors-in-title that the property is part of the Site, that response actions have been and are being performed at the Site and that potentially responsible parties have entered into a Consent Decree. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Owner Settling Defendant(s) shall record the notices within ten (10) days of EPA's approval of the notices. The Owner Settling Defendant(s) shall provide EPA with a certified copy of the recorded notices within ten (10) days of recording such notices. With respect to property owned or controlled by the City of Le Mars, compliance with the obligations in the Order concerning the Environmental Protection Easement and Declaration of Restrictive Covenant, required to be filed pursuant to the Order and referenced in Section XII , Paragraph 33 (b) (ii) of this Decree, shall suffice to comply with its obligations under this Paragraph.

b. At least thirty (30) days prior to the conveyance of any interest in property or

portion of property that is located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Owner Settling Defendant(s) conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site, if any, and (iii) any recorded restrictive covenant authorized and consistent with IOWA law, including Iowa Code, Title XI, Subtitle 1, Chapter 455 I (2005) (The Uniform Environmental Covenants Act), that places use restrictions on and concerning the real property pursuant to Section XII (ACCESS TO PROPERTY AND INSTITUTIONAL CONTROLS). At least thirty (30) days prior to such conveyance, the Owner Settling Defendant(s) conveying the interest shall also give written notice to EPA of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

c. In the event of any such conveyance, the Owner Settling Defendants' obligations under this Consent Decree or the Order, including, but not limited to, the obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section XII (ACCESS TO PROPERTY AND INSTITUTIONAL CONTROLS) of this Consent Decree and the Order, shall continue to be met by the Owner Settling Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the Owner Settling Defendant(s) to comply with all provisions of this Consent Decree or the AOC, as applicable, absent the prior written consent of EPA, allowing any particular Owner Settling Defendant to transfer any of its obligations to the grantee. If the United States approves, the grantee may perform some or all of the Work or obligations of the respective Owner Settling Defendant under this Consent Decree.

**V. PERFORMANCE OF THE WORK BY THE CITY OF LE MARS
PURSUANT TO THE ADMINISTRATIVE ORDER**

9. The City of Le Mars has agreed to and shall comply with the provisions, terms, and schedules set forth in the Order, attached as Appendix B and incorporated by reference into this Consent Decree. The Work the City has agreed to perform at the Site pursuant to the Order includes:

- i. Meetings and Coordination. The City participated in meetings with EPA to discuss, plan and coordinate activities to be performed at the Site under the Order to ensure that those activities were coordinated with EPA's response actions at the Site.
- ii. Backfill. The City provided more than 10,000 cubic yards of backfill soil that was used during and after the excavation activities for EPA's Removal Action at the Site.
- iii. Groundwater Monitoring and Sampling. The City has agreed to conduct semi-annual groundwater monitoring at twelve monitoring wells installed by EPA at and around at the Site. The City has also agreed to maintain and provide to EPA an analytical summary database of the samples collected. The City commenced the initial sampling event as directed by EPA and shall continue groundwater sampling for a period of two years from that initial sampling date.
- iv. Quality Assurance, Quality Control and Data Analysis. All sampling and analyses performed shall conform to EPA Quality Assurance and Quality Control guidelines, procedures, and standards, as set forth in more detail in the Order. The City has agreed to cooperate and provide EPA certain information, including duplicate sampling upon request, to confirm compliance with QA/QC and data analysis procedures.
- v. Temporary Relocation of City Employees. The City temporarily relocated its employees as necessary during the excavation activities.

vi. Health and Safety Plan. The City provided a health and safety plan to ensure protection of public health and safety during performance of on-site Work under the Order.

vii. The City has ceased the use of Municipal wells #4 and #8 for drinking water purposes.

viii. Access and Institutional Controls. The City has agreed to provide access and certain institutional controls as set forth in more detail in the Order and as set forth in Section XII of this Consent Decree (ACCESS TO PROPERTY AND INSTITUTIONAL CONTROLS).

ix. Post-Removal Site Control. The City will submit a proposal for Post Removal Site control. Upon EPA approval, the City will implement the plan and provide necessary documentation.

x. Progress Reports. The City will provide periodic reports concerning its progress and significant developments in conducting response actions consistent with the Order.

xi. Final Report by the City and Notice of Completion of Work by EPA. Within 30 days of completion of all Work required by the Order, the City will submit a duly certified, final report documenting the actions taken, consistent with Section 300.165 of the NCP, 40 C.F.R. § 300.165. If EPA determines that the City's performance of the Work is incomplete or inconsistent with the terms of the Order (including attachments to the Order), EPA will notify the City in writing, provide a list of deficiencies or activities that must be undertaken to complete the Work. The City will modify the Work plan, if appropriate, and implement the activities or correct deficiencies. The City shall perform all activities described in the notice and submit a modified Final Report to EPA. If EPA

determines that all work has been performed in accordance with the Order, with the exception of any continuing obligations that may be required by the Order (e.g., access, institutional controls, and record retention), EPA will provide written notice to the City of Completion of the Work.

xii. Indemnification and Insurance. The City has agreed to provide Indemnification and Insurance consistent with all the terms set for in Sections XXI and XXII of the Order.

10. The explicit obligations and responsibilities of the City under the Order, including the Work described in Paragraph 9 above, are detailed more fully in the Order and its attachments. Except as expressly stated elsewhere in this Decree, the Work requirements and obligations of the City (summarized and described in Paragraph 9, and subparagraphs i to xii, above) shall be governed by the Terms of the Administrative Order on Consent. Paragraph 9 above is meant to be descriptive in nature only.

11. Notwithstanding any provision of this Consent Decree or the Order, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

Nothing in the Order or in this Consent Decree shall be deemed to limit any authority of the United States (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section VIII (COVENANT NOT TO SUE BY THE UNITED STATES). Nor shall anything in this Consent Decree be construed to limit the rights of the State to participate in the selection of remedial actions under Section 121 of CERCLA, 42 U.S.C. § 9621, and the NCP.

VI. PAYMENT OF UNITED STATES' RESPONSE COSTS

12. Payment of United States' Response Costs to EPA. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the United States the following respective sums of the United States' response costs:

a. MidAmerican shall pay \$3.1 million in Response Costs, plus an additional sum for Interest on that amount calculated from the Effective Date of the Decree through the date of payment. Payment shall be in accordance with Paragraphs 12, 13, and 14 of this decree.

b. The City of Le Mars shall pay \$1.5 million in response costs, plus an additional sum for Interest on that amount calculated from the Effective Date of the Decree through the date of payment. Payment shall be in accordance with Paragraphs 12, 13, and 14 of this decree. To the extent that the City elects the option to use the payment procedures (to make multiple payments) provided by subparagraph c (§ 12(c)), interest on the principal shall be paid along with each payment and shall accrue pursuant to those Paragraphs. Payment shall be in accordance with Paragraphs 12, 13, and 14 of this decree.

c. The City has demonstrated to the United States' satisfaction that it has unique financial circumstances. Accordingly, the City may elect to make payment to the United States in three equal installments as follows:

i. First Payment --Within the later of (1) 60 days of the Effective Date of the Consent Decree, or (2) on July 31, 2007, the City shall pay \$500,000 plus any interest that accrues on the total principal amount (\$1.5 million) from the Effective Date until the date of payment;

ii. Second Payment – On or before April 22, 2008, the City shall pay \$500,000 plus any interest that accrues on the unpaid principal amount (\$1 million) until the date of payment.

iii. Third Payment – Due on or before April 22, 2009, pay \$500,000 plus any interest that accrues on the unpaid principal amount (\$500,000) principal until the date of payment.

If the City elects to use the installment method, set forth above, it shall notify the United States that payment is being made in installments pursuant to Paragraph 12(c). In the required notice for each payment, the City shall indicate the amount of the installment payment, and identify the installment payment being made (e.g., “First Payment (of three), due within 60 days of Effective Date, pursuant to Paragraph 12 (c) of the Decree”; Second Payment (of three) due on April 22, 2008 . . .). The City shall include such notice and information in its required notice(s) to the United States under Paragraph 14 of the Decree.

13. Payment shall be made by FedWire Electronic Funds Transfer (EFT) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2006V00579, EPA Site/Spill ID Number 07YH, and DOJ Case Number 90-11-2-08214. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney’s Office in the Northern District of Iowa following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Standard Time) will be credited on the next business day.

14. At the time of each payment, Settling Defendants shall also send notice to the United States (EPA and DOJ) that payment has been made to the United States in accordance with Paragraph 12 of this Section and Section XV (NOTICES AND SUBMISSIONS). Such notice shall reference the EPA Region and Site/Spill Identification Number 07YH, DOJ case number 90-11-2-08214, and the civil action number.

15. Of the total amount to be paid by Settling Defendants pursuant to Paragraph 12, \$3 million shall be deposited in the Hazardous Substance Superfund and \$1.6 million shall be

deposited in the Le Mars Coal Gas Superfund Site Special Account within the Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the Hazardous Substance Superfund.

VII. FAILURE TO COMPLY WITH CONSENT DECREE

16. Interest on Late Payments. If any Settling Defendant fails to make any payment under Paragraph 12 (PAYMENT OF UNITED STATES' RESPONSE COSTS) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

17. Stipulated Penalty.

a. Stipulated penalties concerning payments: If any amounts due under Paragraph 12 are not paid by the required date, Settling Defendants shall be in violation of this Consent Decree and shall pay to the United States, as a stipulated penalty, in addition to the Interest required by Paragraph 16, the following stipulated penalties per violation per day that such payment is late:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1000	1st through 14th day
\$2500	15th through 30th day
\$5,000	31st day and beyond

b. Stipulated penalty for the Work. The Stipulated penalties that would be due and payable by the City of Le Mars for non-compliance with the Work, reporting and other requirements contained in the Administrative Order (attached as Appendix B to this Decree) are set forth in and shall be controlled by the Order (*See* § XVII of the Order). If the City does not comply with the terms of the Order, which is attached and incorporated into this Decree as Appendix B, the City shall be in violation of the Order and the Decree. However, the penalty provisions of the Order will control to determine the appropriate Stipulated Penalties for the

respective violations. The City is not expected to pay penalties under both agreements (*i.e.*, no double penalties).

c. All stipulated penalties under subparagraph a (§ 17(a)) shall be due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to the United States under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name (Le Mars Coal Gas Superfund Site), the EPA Region (Region VII) and Site Spill ID Number 07YH, DOJ Case Number 90-11-2-08214, and the civil action number. Settling Defendants shall send the check (and any accompanying letter) to:

EPA Superfund
US EPA Region VII
Superfund
P.O. Box 371099m
Pittsburgh, PA 15251

d. At the time of each payment, Settling Defendants shall also send notice to the United States (EPA and DOJ) that payment has been made to the United States in accordance with this Section and Section XV (NOTICES AND SUBMISSIONS). Such notice shall reference the EPA Region and Site/Spill ID Number 07YH, DOJ Case Number 90-11-2-08214, and the civil action number.

e. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties under subparagraph a (§ 17(a)) shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

18. If the United States brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

19. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

20. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI (PAYMENT OF UNITED STATES' RESPONSE COSTS) or from performance of any other requirements of this Consent Decree.

VIII. COVENANT NOT TO SUE BY UNITED STATES

21. Covenant Not to Sue by United States. In consideration of the payments that will be made by both Settling Defendants under this Consent Decree and the actions performed by the City under the Administrative Order on Consent, and except as provided in Section IX (RESERVATION OF RIGHTS BY UNITED STATES), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with respect to the Work and Past or Future Response Costs relating to the Site. Except with respect to future liability, the covenant not to sue shall take effect with respect to each Settling Defendant upon the receipt by EPA of all payments as required by Section VI, Paragraph 12 (PAYMENT OF UNITED STATES' RESPONSE COSTS) and any amount due under Section VII (FAILURE TO COMPLY WITH CONSENT DECREE) for each respective Settling Defendant. This covenant not to sue is conditioned upon the satisfactory compliance with and performance by Settling Defendants of their respective obligations under this Consent Decree, and, with respect to

the City, also includes satisfactory performance and compliance by the City under the Order. With respect to future liability of the City, the covenant not to sue shall take effect with respect to the City after satisfactory performance of the City of its obligations under the Consent Decree and the Administrative Order on Consent and upon Certification of Completion of the Removal Action by EPA under Paragraph 26, consistent with 42 U.S.C. 9622(f)(3). This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

IX. RESERVATION OF RIGHTS BY THE UNITED STATES

22. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in Paragraph 21. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

a. liability or claims for failure of Settling Defendants to meet a requirement of this Consent Decree;

b. liability of the City for any failure to meet a requirement of the Order, including any liability for costs of work takeover;

c. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs or Future Response Costs, including the City's liability for costs of work takeover under the Order;

d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606, for response actions required by the administrative Order;

e. criminal liability;

f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

g. liability, based upon any Settling Defendant's ownership or operation of the Site

or any portion thereof, or upon any Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants; and

h. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

23. United States' Pre-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Removal Action:

(i) conditions at the Site, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Removal Action is not protective of human health or the environment.

24. United States' Post-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, subsequent to Certification of

Completion of the Removal Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Removal Action is not protective of human health or the environment.

25. For purposes of Paragraph 23 [pre-certification], the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the Action Memorandum was signed and shall include information set forth in that Action Memorandum and the administrative record supporting that decision. For purposes of Paragraph 24 [post certification], the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Removal Action and set forth in the agency's administrative record for the Removal Action, including the administrative record supporting the Action Memorandum, the post-Action Memorandum administrative record for the Removal Action, and information received by EPA pursuant to the Work and other requirements of the Consent Decree (and the Order) up to the date of Certification of Completion under Paragraph 26 of this Decree.

26. For purposes of Paragraphs 21 and 23 through 26, Certification of Completion of the Removal Action shall occur and be issued by EPA following EPA's final OSC closeout report for the Removal Action and EPA's written Notice (Pursuant to Paragraph 9 of this Decree) of "Completion of the Work." As soon as reasonably practicable after such a certification is possible, EPA will certify in writing that the "Removal Action" has been performed fully and that the performance standards have been attained. This certification shall constitute the Certification of Completion of the Removal Action for purposes of Paragraphs 21 and 23 through 26 above.

X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

27. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees, with respect to the Site, Response Costs, or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions, response activities, or response costs at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State of Iowa, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claims against the United States related to the Site, including any department, agency or instrumentality of the United States under CERCLA Sections 106, 107 or 113 related to the Site, or

28. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

29. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as expressly stated in this Decree, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site, including those against any

person not a Party hereto.

30. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the date of entry of this Consent Decree, to the protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Past Response Costs and Future Response Costs, and the Work performed in compliance with this Decree and the Order.

31. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

32. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VIII (COVENANTS NOT TO SUE BY UNITED STATES).

XII. ACCESS TO PROPERTY AND INSTITUTIONAL CONTROLS

33. If the Site, or any other property where access is needed to implement response activities at the Site, is owned or controlled by any of the Settling Defendants, such Settling Defendant shall –

a. Commencing on the date of lodging of this Consent Decree, provide the United States, the State, and the respective representatives and contractors of each, including EPA and contractors, with access at all reasonable times to the Site, or to such other property, for the purpose of conducting any response activity related to the Consent Decree, the Order, or the Site, including, but not limited to, the following activities:

i. Monitoring, investigation, removal, remedial or other activities at the Site;

ii. Verifying any data or information submitted to the United States or the State;

iii. Conducting investigations relating to contamination at or near the Site;

iv. Obtaining samples;

v. Assessing the need for, planning, or implementing response actions at or near the Site;

vi. Implementation of the Work pursuant to the conditions set forth in Paragraph 86 of the Administrative Order on Consent (attached as Appendix B of this Decree);

vii. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XIII (ACCESS TO INFORMATION);

viii. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree; and

ix. Assessing compliance by any Settling Defendant with this Consent Decree and/or the Administrative Order on Consent.

b. Institutional Controls. Commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of removal, remedial or response activities performed or to be performed at the Site.

i. Pursuant to the February 4, 2005, Administrative Order on Consent (attached as Appendix B to this Consent Decree), the City of Le Mars has agreed and agrees here to implement institutional controls at the Site to prevent exposure to contaminated soils and groundwater. The City agrees to coordinate with EPA to ensure that future activities do not impair the integrity of removal, remedial or other response actions or cause potential harm to human health or the environment. Specifically, the City agrees to refrain from using the Site in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of response activities performed or to be performed at the Site. Such restrictions include, but are not limited to, *refraining from*: (1) construction, installation, maintenance or use of any wells at the Site for the purpose of extracting water for drinking water purposes; (2) disturbance of the subsurface of the Site without prior EPA approval; (3) any type of residential development; and (4) any building construction that includes a basement.

ii. Pursuant to the Order, the City of Le Mars has agreed to execute and record in the Recorder's Office, Registry of Deeds or other appropriate land records office of Plymouth County, State of Iowa an Environmental Protection Easement and Declaration of Restrictive Covenants that runs with the land. The Easement and Covenant grants certain enforcement rights and shall be consistent with Iowa Laws for such instruments. The City will provide EPA with a certified copy of the original officially recorded instrument. The

implementation of institutional controls on property located within the Site is required to ensure continued protection of human health and the environment and the integrity of the response actions taken or to be taken at the Site. **(Appendix C, final to be attached when the City provides to EPA.)**

c. If the Site (or any portion of the Site), or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, the Order, or response activities is owned or controlled by persons other than any of the Settling Defendants, the City of Le Mars has agreed under the Order to use best efforts to obtain necessary agreements. Consistent with the terms of the Order, the City shall notify EPA immediately if after using best efforts, it is unable to obtain such agreements. For purposes of this Paragraph, best efforts includes the payment of reasonable sums of money in consideration of access. Where the City has used best efforts and failed to gain access, the United States may, as it deems appropriate, assist the City in gaining access, to the extent necessary to effectuate response actions. *See* Appendix B, Order at ¶50.

d. Notwithstanding any provision of this Agreement, EPA (and the State) retain all of their access authorities and rights, as well as all of its (their) rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

XIII. ACCESS TO INFORMATION

34. Settling Defendants shall provide to EPA, upon request, copies of all records, documents, reports, or information (hereinafter referred to collectively as "records") within their possession or control or that of their contractors or agents relating to releases and threatened releases of hazardous substances at or from the Site, activities at the Site, or to the implementation of this Consent Decree, the Order, or the Work, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence,

or other documents or information (hard copy or electronic) related to the Site. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work or other response or Site related activities.

35. Confidential Business Information and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the records or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Records or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records (or information) when they are submitted to EPA, or if EPA has notified Settling Defendants that the records (or information) are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing records, they shall provide Plaintiff with the following: (1) the title of the record; (2) the date of the record; (3) the name, title, affiliation (e.g., company or firm), and address of the author of the record; (4) the name and title of each addressee and recipient; (5) a description of the subject of the record; and (6) the privilege asserted. If a claim of privilege applies only to a portion of a record (or information), the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendants shall retain all records (and information) that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been

resolved in the Settling Defendants' favor. However, no records (including documents, reports, data, and other information) created or generated pursuant to the requirements of this Decree or any other settlement with the EPA pertaining to the Site, including the Order, shall be withheld on the grounds that they are privileged.

36. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XIV. RETENTION OF RECORDS

37. Until 10 years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all records, reports, documents or information (hereinafter referred to collectively as "records") now in its possession or control (or the possession or control of its contractors and agents), or which come into its possession or control, that relate in any manner to response actions taken at the Site, the Work under the Order, releases or threatened releases of hazardous substances at or from the Site, or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

38. After the conclusion of the 10-year document retention period in the preceding Paragraph, Settling Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendants shall deliver any such records to EPA. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff with the following: (1) the title of the record; (2) the date of the record; (3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; (4) the name and title of each addressee and recipient; (5) a description of the subject of the record; and (6) the privilege asserted. If a claim of privilege applies only to a portion

of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendants shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor. However, no records created or generated pursuant to the requirements of this Decree or any other settlement with the EPA pertaining to the Site, including the Order, shall be withheld on the grounds that they are privileged.

39. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, documents or information (other than identical copies) relating to its potential liability at or relating to the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

XV. NOTICES AND SUBMISSIONS

40. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, DOJ, EPA, and Settling Defendants, respectively.

As to the United States:

As to DOJ: Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(Ref: DJ # 90-11-2-08214; U.S. v. MidAmerican Energy Company, et al.)

As to EPA: Celia Tapia
Director
Superfund Division
U.S. EPA Region VII
901 North 5th Street
Kansas City, Kansas 66101

Alyse Stoy
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101

Dan Garvey
On Scene Coordinator
U.S. EPA Region VII
901 North 5th Street
Kansas City, Kansas 66101

Linda Long
Regional Financial Management Officer
U.S. EPA Region VII
901 North 5th Street
Kansas City, Kansas 66101

As to the Settling Defendants:

General Counsel
MidAmerican Energy Company
666 Grand Avenue
P.O. Box 657
Des Moines, Iowa 50306

Joseph Flannery
City Attorney
Law Office of Joseph W. Flannery, P.C.
P.O. Box 158
11 Central Avenue, NW
Le Mars, Iowa 51031-0158

Beverley Langel
City Clerk
P.O. Box 1130
40 Central Ave, S.E.
Le Mars, Iowa 51031

XVI. RETENTION OF JURISDICTION

41. This Court shall retain jurisdiction over the subject matter of this Consent Decree and the parties for the duration of the performance of the terms and provisions of this Consent Decree for

the purpose of interpreting, effectuating and/or enforcing compliance with the terms of this Consent Decree.

XVII. APPENDICES

42. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is two maps of the Site.

“Appendix B” is the February 4, 2005, Administrative Order on Consent

“Appendix C” is the Easement and Restrictive Covenant Document

XVIII. COMMUNITY RELATIONS

43. The City of Le Mars shall cooperate and participate with EPA in any community relations or community relations plan developed or to be developed by EPA. EPA will determine the appropriate role for the City in community relations or under any Plan. The City shall also cooperate with EPA in providing information regarding the Work to the public, as may be necessary. To the extent necessary and as requested by EPA, the City shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

44. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for publication of notice in the Federal Register and public comment in accordance with CERCLA Section 122, 42 U.S.C. § 9622, and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is not appropriate, proper, adequate, or consistent with federal law. Settling Defendants consent to the entry of this Consent Decree without further notice.

45. If for any reason this Court should decline to approve this Consent Decree in the form

presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XX. SIGNATORIES/SERVICE

46. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that the representative is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

47. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

48. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXI. EFFECTIVE DATE

49. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXII. FINAL JUDGMENT

50. This Consent Decree and its appendices and attachments (including the Administrative Order issued to the City) constitute the final, complete, and exclusive agreement and understanding between the United States and Settling Defendants with respect to the settlement embodied in the

Consent Decree. The parties acknowledge that there are no representations, agreements, or understandings with respect to the United States' settlement of its claims against the Settling Defendants other than those expressly contained in this Consent Decree.

51. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 2007.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. MidAmerican Energy Company and the City of Le Mars*, relating to the Le Mars Coal Gas Superfund Site.

FOR THE UNITED STATES OF AMERICA

RONALD J. TENPAS
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Date: 5/31/07

ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section

Date: 5/31/07

ROBIN E. LAWRENCE
Senior Counsel
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Environment and Natural Resources Division
Environmental Enforcement Section
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Northern District of Iowa

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U.S. Attorney's Office
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401 First Street SE, Suite 400
Cedar Rapids, IA 52401-1825
(319) 363-6333
Fax: (319) 363-1990
Bob.Butler@usdoj.gov

Date: 4/30/07

Cecilia Tapia
Director Superfund Division
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101

Date: 4/27/07

David Cozad
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101

Date: 4/25/07

Alyse Stoy
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. MidAmerican Energy Company and the City of Le Mars*, relating to the Le Mars Coal Gas Superfund Site.

FOR MIDAMERICAN ENERGY COMPANY:

Authorized Party Representative:

[Corporate official with appropriate authority to execute and bind MidAmerican Energy Company, i.e., President]

Date: 1/18/07

Name: Todd Raba
Title: President
Address: 666 Grand Avenue
Des Moines, IA 50309

Counsel For MidAmerican Energy Company:

Date: 1/14/07

Ms. Peg Roy, Esq.
MidAmerican Energy Company
666 Grand Avenue
2800 Ruan Center
Des Moines, Iowa 50309
Fax: 515-281-2970
Phone: 515-281-2779

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Paul J. Leighton
Title: Vice President
Address: 666 Grand Avenue
Des Moines, IA 50309

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. MidAmerican Energy Company and the City of Le Mars*, relating to the Le Mars Coal Gas Superfund Site.

FOR THE CITY OF LE MARS, IOWA:

Authorized Party Representative:

Date: 2-20-07

Name: Virgil Van Beak
Title: Mayor, City of Le Mars
Address: P.O. Box 1130
40 Central Ave, S.E.
Le Mars, Iowa 51031

Date: 2-20-07

Name: Beverley Langel
Title: City Clerk
Address: P.O. Box 1130
40 Central Ave, S.E.
Le Mars, Iowa 51031

Counsel for the City of Le Mars, Iowa:

Date: 2-20-07

Joseph Flannery
City Attorney
Law Office of Joseph W. Flannery, P.C.
P.O. Box 158
11 Central Avenue, NW
Le Mars, Iowa 51031-0158
Fax: (712) 548-4667
Phone: (712) 546-1605

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Joseph Flannery
Title: City Attorney
Address: P.O. Box 158
Le Mars, Ia 51031

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